

## Chapter 5      Consultation, Review, and Permit Requirements

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This chapter addresses Federal Statutes, Implementing Regulations, and Executive Orders potentially applicable to the proposed project. This Draft EIS is being sent to tribes, federal agencies, and state and local governments as part of the consultation process for this project.

### 5.1 National Environmental Policy Act

This EIS has been prepared by BPA pursuant to regulations implementing the **National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)**, which requires federal agencies to assess the impacts that their actions may have on the environment. BPA's potential acquisition of power from the proposed project requires that BPA assess the potential environmental effects of the proposed project and describe them in an EIS.

This EIS was prepared in compliance with NEPA guidelines. As the federal lead agency, BPA held public scoping meetings (July 19 and 20, 2000) and invited comments on the scope of the EIS. BPA's public involvement activities for the project are discussed further in Chapter 1 and Appendix A. The EIS and the overall processes by which it was developed comply with NEPA's requirement for documentation and public involvement.

### 5.2 Threatened and Endangered Species and Critical Habitat

The **Federal Endangered Species Act (ESA) (16 U.S.C. 1531-1544, December 28, 1973, as amended 1976-1982, 1984 and 1988)** requires federal agencies to ensure that their actions do not jeopardize endangered or threatened species or their critical habitats. The ESA provides broad protection for species of fish, wildlife, and plants listed as threatened or endangered in the United States or elsewhere. The ESA is administered by the U.S. Fish and Wildlife Service (USFWS) and, for salmon and other marine species, by the National Marine Fisheries Service (NMFS). The ESA defines procedures for listing species, designating critical habitat for listed species, and preparing recovery plans. The ESA also specifies prohibited actions and exceptions.

Prohibited actions defined in Section 9 of the ESA include "take" of a listed species. Take is defined as any action that would harass, harm, wound, or kill a listed species. Section 7 of the ESA enables the USFWS or NMFS to issue a permit to a federal agency for incidental take (that is, unintentional take of a listed species resulting from otherwise legal activities).

BPA requested information on the occurrence of ESA-listed species in the study area; letters from USFWS and NMFS are included in Appendix B. Oregon Department of Fish and Wildlife (ODFW) staff were also interviewed for information on special-status species. Field studies included a four-season avian study conducted by URS, Inc., and field visits by Jones & Stokes biologists during 2000. The occurrence of special-status species in the study area, and potential impacts on these species, are discussed in Sections 3.4, 3.5, and 3.6 in Chapter 3 of this EIS. A biological assessment will be prepared for the project and submitted to USFWS in compliance with Section 7 of the ESA.

The **Oregon Endangered Species Act** requires the ODFW to develop programs for the management and protection of state-listed species. However, the Act does not prohibit the take of state-listed species. The **Gilliam County Code (Section 4.090. SR. Significant Resource Combining Zone)**

designates Significant Resource Zones to protect significant mineral resources, scenic areas, natural areas, and fish and wildlife habitat in the county. Sections 3.4, 3.5, and 3.6 in Chapter 3 of this EIS discuss these regulations as they relate to the proposed project.

### 5.3 Fish and Wildlife Conservation

**The Fish and Wildlife Conservation Act of 1980 (16 USC 2901 et seq.)** encourages federal agencies to conserve and promote conservation of non-game fish and wildlife species and their habitats. Sections 3.4 and 3.6 in Chapter 3 of this EIS document information obtained from ODFW, as well as potential fish and wildlife impacts and mitigation.

In addition, the **Fish and Wildlife Coordination Act (16 USC 661 et seq.)** requires federal agencies undertaking projects affecting water resources to consult with the USFWS and the state agency responsible for fish and wildlife resources (ODFW). The proposed project would not affect water resources.

**The Pacific Northwest Electric Power Planning and Conservation Act or “Northwest Power Act” (16 U.S.C. 839 et seq.)** established the Pacific Northwest Electric Power and Conservation Planning Council to develop a Regional Electric Power and Conservation Plan. The Northwest Power Act encourages the development of renewable resources within the Pacific Northwest and authorizes BPA to acquire renewable resources that have potential for providing cost-effective service to the region. In February 1993, BPA published the Resource Programs EIS (RP EIS), a programmatic document that evaluates the environmental tradeoffs among generic resource types and the cumulative effects of adding these resources to the existing system. Based on the RP EIS, BPA adopted the Emphasize Conservation Alternative in the April 22, 1993, Resource Programs ROD. This alternative emphasizes conservation and efficiency improvements, supplemented by renewable and thermal resources, as the most cost-effective and environmentally responsible option for BPA’s long-term conservation and generation resource acquisition objectives. BPA’s Business Plan EIS updated the information and analyses in the RP EIS and confirmed the inclusion of renewable resources in the regional energy portfolio.

As a renewable resource, the proposed project would implement one element of BPA’s Emphasize Conservation Alternative. As described in the RP EIS and subsequent April 22, 1993, ROD, this document is tiered to the RP EIS and evaluates the potential site-specific impacts from the proposed project.

**The Migratory Bird Treaty Act (16 U.S.C. 703-712)** prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. Most species of birds are classified as migratory under the Act, except for nonnative birds such as pheasant, chukar, gray partridge, house sparrow, European starling, and rock dove.

**The Bald Eagle Protection Act (BEPA), 16 U.S.C. 668-668d, June 8, 1940, as amended 1959, 1962, 1972, and 1978,** prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions. Because a small number of bald eagles reside within foraging distance of the proposed project, some mortality of bald eagles could possibly result. However, because BEPA covers only intentional acts, or acts in “wanton disregard” of the safety of golden or bald eagles, this project is not viewed as subject to its compliance. See Section 3.6 in Chapter 3 of this EIS for further discussion.

**Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds,** directs each federal agency that is taking actions having or likely to have a negative impact on migratory bird populations to work with the USFWS to develop an agreement to conserve those birds. The protocols

developed by this consultation are intended to guide future agency regulatory actions and policy decisions; renewal of permits, contracts or other agreements; and the creation of or revisions to land management plans.

## 5.4 Heritage Conservation

Regulations established for the management of cultural resources include:

- **Antiquities Act of 1906 (16 U.S.C. 431-433);**
- **Historic Sites Act of 1935 (16 U.S.C. 461-467);**
- **Section 106 of the National Historic Preservation Act (NHPA) of 1966 (16 U.S.C. 470 et seq.), as amended;**
- **Archaeological Data Preservation Act (ADPA) of 1974 (16 U.S.C. 469 a-c);**
- **Archaeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. 470 et seq.), as amended;**
- **Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.); and**
- **Executive Order 13007 Indian Sacred Sites.**

For this project, BPA has undertaken the Section 106 consultation process with the State Historic Preservation Officer, the Advisory Council on Historic Preservation, and the affected Native American tribes. BPA's 1996 government-to-government agreement with 13 federally-recognized Native American tribes of the Columbia Basin identifies the roles and responsibilities of both parties and provides guidance for the Section 106 consultation process with the tribes.

The NHPA amendments specify that properties of traditional religious and cultural importance to a Native American tribe (also known as Traditional Cultural Properties) may be determined to be eligible for inclusion on the National Register of Historic Places. In carrying out its responsibilities under Section 106, BPA is required to consult with any Native American tribe that attaches religious and cultural significance to any such properties.

NAGPRA requires consultation with appropriate Native American tribal authorities prior to the excavation of human remains or cultural items (including funerary objects, sacred objects, and cultural patrimony) on federal lands or for projects that receive federal funding. NAGPRA recognizes Native American ownership interests in some human remains and cultural items found on federal lands and makes illegal the sale or purchase of Native American human remains, whether or not they derive from federal or Indian land. Repatriation, on request, to the culturally affiliated tribe is required for human remains.

Executive Order 13007 addresses "Indian sacred sites" on federal and Indian land. "Sacred site" means any specific, discrete, narrowly delineated location on federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. This order calls on agencies to do what they can to avoid physical damage to such sites, accommodate access to and ceremonial use of Indian sacred sites, and facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on federal lands.

Section 3.8 in Chapter 3 of this EIS discusses cultural resources on the project site and in the study area, potential impacts, and mitigation measures to protect archaeological and historic resources.

## 5.5 State, Areawide, and Local Plan and Program Consistency

The Council on Environmental Quality regulations for implementing NEPA (CFR 1506.2) require agencies to consider the consistency of a proposed action with approved state and local plans and laws.

The state and local land use planning framework for the proposed project includes the **Gilliam County Comprehensive Land Use Plan and Zoning Ordinances, adopted in November 2000; Gilliam County Zoning Map; Oregon Statewide Planning Goal 11 (Public Facilities); and Oregon Administrative Rules.**

The majority of Gilliam County is zoned Exclusive Farm Use (EFU), including the study area and adjacent lands. There are no regional or special district plans that govern the study area. Uses that are permitted outright in EFU zones generally include farms, single-family dwellings, harvesting, utility facility service lines, operation and maintenance of transportation facilities, fire service facilities, irrigation canals, and sites for takeoff and landing of model aircraft. Additional uses such as the proposed project can be permitted with a Conditional Use Permit. Consistency of the project with state and local plans is further discussed in Section 3.2 in Chapter 3 of this EIS.

The county does not have a critical areas ordinance that would address potential geologic hazards in the project site and study area. There are no specific requirements or guidelines issued by the county with respect to geologic conditions. Current Oregon building codes are specified in **Oregon Regulatory Statute (ORS) 455.010 through 455.895**. Geologic hazard regulations are overseen by the Oregon Department of Land Conservation and Development, as defined in **ORS 660.015**. The study area falls within Seismic Zone 2B of the **1997 Uniform Building Code**. See Section 3.3 in Chapter 3 of this EIS for further discussion of geology and soils.

In terms of policies related to transportation, the contract companies and wind turbine manufacturers would consult with ODOT and Gilliam County Public Works Department to ensure the most appropriate routes for site access during project construction. Necessary permits for transportation of large loads on the roadways would be secured as required. See Section 3.11 in Chapter 3 of this EIS for further discussion of transportation issues.

## 5.6 Coastal Zone Management Program Consistency

As an agency of the federal government, BPA is subject to the **Coastal Zone Management Act (16 U.S.C. Sections 1451-1464)**. The proposed project is not in the coastal zone, nor would it directly affect the coastal zone.

## 5.7 Floodplains and Wetlands Protection

The Department of Energy mandates that impacts to floodplains and wetlands be assessed, and alternatives for protection of these resources be evaluated. Regulations are provided through **10 CFR 1022.12, and Federal Executive Orders 11988 and 11990**. No streams or associated floodplains exist within the project site. No wetlands are present where either construction or operations activity would occur.

## 5.8 Farmlands

The **Farmland Protection Policy Act (7 U.S.C. 4201 et seq.)** directs federal agencies to identify and quantify adverse impacts of federal programs on farmlands. The Act's purpose is to minimize the number of federal programs that contribute to the unnecessary and irreversible conversion of agricultural land to non-agricultural uses.

Impacts on agricultural lands are discussed in Section 3.2 in Chapter 3 of this EIS. Following construction, the permanent project facilities would occupy a land area of approximately 38 acres, of which 30 acres is cropland (25 acres) and CRP land (5 acres). Although the 30 acres of agricultural land converted to use for the project would no longer be available for farm use, it represents a very small portion (less than 1 percent) of the agricultural acreage in the study area and a negligible amount of the agricultural land in Gilliam County (more than 696,000 acres). The proposed project would not appreciably disrupt the current and planned agricultural uses of the land. No designated prime, unique, or other farmland of statewide importance would be affected by construction of the project or converted to permanent project facilities.

## 5.9 Recreation Resources

None of the project components would be located near any formal existing recreation facilities. Upland bird hunting may be interrupted temporarily in the vicinity of the project site during construction.

## 5.10 Global Warming

The proposed project would not generate emissions of gases (such as carbon dioxide) that contribute to global warming. To the extent wind energy reduces the amount of fossil fuel generation, global warming impacts can be avoided.

## 5.11 Permit for Structures in Navigable Waters

The proposed project does not include work or structures that are in or on any navigable waters of the United States as defined in the **Rivers and Harbors Act of 1899 (33 U.S.C. 403)**.

## 5.12 Permit for Discharges into Waters of the United States

On December 8, 1999, the U.S. Environmental Protection agency (EPA) adopted rules pertaining to stormwater discharges into surface water bodies (**40 CFR 122-124**). The amended regulations require that National Pollutant Discharge Elimination System (NPDES) permits be obtained for construction activities, including clearing, grading, and excavation, that disturb 1 to 5 acres of land. Under **Section 402 of the Clean Water Act**, federal facilities (or projects) are subject to these permitting requirements. Administration of this program has been delegated to the state; however, for federal projects, EPA administers this program. The best management practices described in Section 3.3 in Chapter 3 of this EIS will be used to ensure that no sediments reach surface waters during the construction of the proposed project, so a permit is not required.

## 5.13 Permits for Right-of-Way on Public Lands

The project site comprises privately owned land. No permits for rights-of-way on public lands would be required.

## 5.14 Energy Conservation at Federal Facilities

This is not applicable to the proposed project.

## 5.15 Pollution Control at Federal Facilities

The **Clean Air Act as revised in 1990 (PL 101-542, 42 U.S.C. 7401)** requires the EPA and states to carry out programs intended to ensure attainment of National Ambient Air Quality Standards. In the project vicinity, authority for ensuring compliance with the Act is delegated to the Oregon Department of Environmental Quality (ODEQ). The General Conformity Requirements of the Code of Federal Regulations require that federal actions do not interfere with state programs to improve air quality in nonattainment areas.

The air quality attainment status of Gilliam County is not currently classified and air quality in the county is not monitored. Because of the sparse population and rural nature of the area, Gilliam County is likely to be in attainment for all criteria pollutants. Air quality impacts of the proposed project would be negligible, as discussed in Section 3.12 in Chapter 3 of this EIS.

The **Clean Water Act (CWA) (33 U.S.C. 1251 et seq.)** regulates discharges into waters of the United States. It sets national goals and policies to eliminate discharge of water pollutants into navigable waters, to regulate discharge of toxic pollutants, and to prohibit discharge of pollutants from point sources without permits. The primary instrument for implementing the CWA is the NPDES permit (discussed under Section 5.12 above). In the state of Oregon, the ODEQ has responsibility for implementing the CWA. As discussed in Section 3.7 in Chapter 3 of this EIS, with implementation of proper erosion and soils management techniques during construction and operation of the project, no impacts on water resources or wetlands regulated under the CWA are anticipated.

**Section 10 of the Rivers and Harbors Act (33 U.S.C. 403)** regulates all work done in or structures placed below the ordinary high water mark of navigable waters of the United States. No work associated with the proposed project would occur in such water bodies.

The **Safe Drinking Water Act (42 U.S.C. Section 300f et seq.)** protects the quality of public drinking water and its source. BPA would comply with state and local public drinking water regulations. The proposed project would not affect any sole source aquifers or other critical aquifers, or adversely affect any surface water supplies.

The **Noise Control Act of 1972 as amended (42 U.S.C. 4901 et seq.)** sets forth a broad goal of protecting all people from noise that jeopardizes their health or welfare. It places principal authority for regulating noise control with states and local communities. Noise standards applicable to the proposed project are established under ORS Chapter 467 (Noise Control), and the Oregon Administrative Rules (OAR) Division 35 (Noise Control Regulations). Responsibility for enforcement of applicable regulations is assigned to the local sheriff's department (in this case, Gilliam County). The ODEQ provides assistance and guidance as required. The allowable hourly noise levels under Oregon state law, and potential noise impacts associated with the project, are described in Section 3.13 in Chapter 3 of this EIS.

## 5.16 Hazardous Materials

The **Spill Prevention Control and Countermeasures Act, Title III of the Superfund Amendments and Reauthorization Act, and the Resource Conservation and Recovery Program** potentially apply to the proposed project, depending on the exact quantities and types of hazardous materials stored onsite. Regulations would be enforced by the ODEQ and Oregon Department of

Health. In addition, development of a Hazardous Materials Management Plan in accordance with the Uniform Fire Code may be required by the local fire district.

The **Toxic Substances Control Act (15 U.S.C. 2601-2671)** regulates the use, storage, and disposal of PCBs. Transformers on the wind turbines would contain cooling oil that does not contain PCBs.

The **Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.)** registers and regulates pesticides. If herbicides are used at all for the proposed project, they would be used at landowner request to minimize introduction of weeds into adjacent cultivated areas. Herbicides would be applied either by the landowner or, after consultation with the landowner, by a contract professional charged with observance of all regulations governing use and selection of herbicides. Herbicides would not be stored onsite, nor would any excess herbicides be disposed of onsite.

## **5.17 Environmental Justice**

In February 1994, **Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations**, was released to federal agencies. This order directs federal agencies to incorporate environmental justice as part of their missions. As such, federal agencies are specifically directed to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations.

The proposed project has been evaluated for potential disproportionately high environmental effects on minority and low-income populations (see Section 3.10 in Chapter 3 of this EIS). There would not be a human health or environmental impact on minority and low-income populations from the proposed project.

## **5.18 Notice to the Federal Aviation Administration**

As part of project design, the proponent would comply with Federal Aviation Administration (FAA) procedures. Because the project turbines and meteorological towers would not exceed 200 feet in height, it is unlikely that a Notice of Proposed Construction or Alteration (Form 7460-1) would need to be filed with the FAA. Final locations of structures, structure types, and structure heights would be submitted to FAA for review. FAA may then conduct its own study of the project and make recommendations to BPA and the proponent regarding possible airway marking, lighting, and other safety requirements.